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In the Supreme Court of the United States

OCTOBER TERM, 1929

INTERNATIONAL PAPER COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 65–74) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on November 4, 1929. (R. 74.) Petition for certiorari was filed January 23, 1930. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Did the requisition by the President, because of the exigencies of national security and defense, of

the distribution of the electrical power capable of being produced by the Niagara Falls Power Company by the utilization of all the water it was authorized to divert from the Niagara River under its license from the Secretary of War, a portion of which water the Power Company was legally bound to deliver to the petitioner at the time of the President's order of requisition and which in compliance with said order it failed to deliver, entitle the petitioner to a judgment for compensation against the United States?

STATEMENT

Petitioner owned and operated a plant for the manufacture of paper near and above the falls of the Niagara River. The power for the plant was derived exclusively from water of the Niagara River. (R. 47.) This was drawn from the canal of the Niagara Falls Power Company. (R. 47–48.) The petitioner's authority to draw and use this water was derived under various instruments from the Niagara Falls Power Company, conveying that right under the laws of the State of New York. (R. 53, 54, 56–58.)

In 1917 the Niagara Falls Power Company, under a revocable license from the Secretary of War, and pursuant to private conveyances of lands abutting on the Niagara River and letters patent from the State of New York, and under the privilege of special Acts from the State of New York, was diverting 10,000 c. f. p. s. of water from the Niagara River. (R. 51–52.) From this total

amount 720 c. f. p. s. were allocated by the Niagara Falls Power Company to the petitioner's mill (R. 54), the balance being used by the Power Company to generate electricity for commercial purposes.

On December 28, 1917, after investigation by the Council of National Defense (R. 55–56) under authority of the President, and "by reason of the exigencies of the national security and defense," the Secretary of War requisitioned the total quantity and output of the electrical power which was capable of being produced and/or delivered by the Niagara Falls Power Company through the use of all water of the Niagara River diverted or capable of being diverted through its intake canal. It was stipulated in the requisition that just compensation would be paid for power delivered thereunder. (R. 58.)

The Secretary of War advised the Power Company that this requisition contemplated the use of all waters originally diverted from the Niagara River by the Niagara Falls Power Company, and particularly included that formerly allocated to the petitioner. (R. 61.) Coincidentally with the making of the requisition there was delivered to the Power Company a tentative schedule of approved consumers accompanying a temporary waiver (R. 58–61), which, in substance, provided that the United States would waive its demand for the exclusive power output of the Niagara Falls Power

Company, provided the power developed by the Company should be expended in accordance with the schedule. The Niagara Falls Power Company waived all rights to compensation from the Government, but was paid by the individual consumers for the power furnished. (R. 58–61.)

The petitioner was not among those listed as being entitled to power or other service from the Niagara Falls Power Company. (R. 61.) The manufacture of the particular character of paper produced in the petitioner's Niagara mills was not designated as an essential industry in the prosecution of the war. (R. 55.) On February 7, 1918, the petitioner ceased using the water from the canal of the Power Company, and did not resume the use of such water until November 30, 1918, when the prior order of requisition was abrogated. (R. 62.) During this entire period the Power Company, acting by and under the authority of the War Department, appropriated and used all the water diverted from the Niagara River through its canal and did not deliver any water to the petitioner. (R. 62, 63.)

The Paper Company has never been compensated by the United States or anyone else for the losses suffered by it as a result of being deprived of its water power. (R. 63.)

ARGUMENT

I

THE SUBSTANTIAL EFFECT OF THE ACTION OF THE SECRETARY OF WAR WAS THE SAME AS IF HE HAD REVOKED THE LICENSE OF THE NIAGARA FALLS POWER COMPANY, AND SUCH A REVOCATION WOULD HAVE IMPOSED NO LIABILITY ON THE UNITED STATES

Pursuant to authority granted to the Secretary of War by statute (Resolution of January 19, 1917, c. 18, 39 Stat. 867; Resolution of June 30, 1917, c. 34, 40 Stat. 241; see also Resolution of June 29, 1918, c. 111, 40 Stat. 633) "permission, revocable at will" by the Secretary of War (R. 51–52) was given the Niagara Falls Power Company to divert water from the Niagara River for the creation of power. The petitioner's right to use this water was derived from the Power Company, and it had no higher rights than those possessed by the Power Company.

The license granted to the Power Company was, under the statute and by its terms, revocable at will. That which actually occurred was no different in substantial effect than what would have occurred if the Secretary of War had in terms revoked the license of the Power Company and then granted to it a new license with the condition that none of the water should be furnished to the petitioner. No liability would have been incurred by the United States through such a revocation of a license which was in terms revocable. The rights of the petitioner, we submit, can not be greater because this was not the precise form which the

transaction took, when the substantial effect was the same.

The requisition of the Secretary of War was in substance and effect a qualification of the revocable license previously issued by him to the Power Company.

II

THERE WAS NO TAKING OF ANY PROPERTY BELONGING TO THE PETITIONER

Whether or not the interests of the petitioner were in the nature of real rights, the decisions in New York show that these rights were subject to the paramount right of the public. *People ex rel. Niagara Falls Hydraulic Power & Mfg. Co.* v. *Smith,* 70 App. Div. 543, 546, affirmed without opinion, 175 N. Y. 469; *United Paper Board Co.* v. *Iroquois Pulp & Paper Co.,* 226 N. Y. 38, 49. In the first of these cases the court referred to—

> the paramount right of the state to utilize these waters for a public use, without compensation to such riparian owners.

The petitioner was not a riparian owner. Its rights were derived solely through its agreements with the Niagara Falls Power Company. The Government did not take legal title nor physical possession of any property, and certainly not of any property of the petitioner. As the court below said (R. 71):

> What the Government took by the requisition order, if it took anything, was the prod-

> uct of the Niagara Falls Power Company. It did not take its plant or the use of it. It did not take its canal. It took what power it could produce and was producing from the entire plant; that is, as stated, it took the product of the plant, not the plant.

Acting in its sovereign capacity the Government diverted the power produced by the plant to the use of industries deemed essential in the conduct of the war. The consequential loss to the petitioner from this act of the Government was not, it is submitted, a direct appropriation, nor a taking of the petitioner's property within the meaning of the Fifth Amendment.

The petitioner's rights derived under its agreements with the Power Company, being subject to the paramount authority of the Government, and the loss to the petitioner being consequential only, the case comes within the rule of *Omnia Commercial Co.* v. *United States,* 261 U. S. 502. In that case this Court said (pp. 511, 513):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.
>
> * * * * *

> If one makes a contract for the personal services of another or for the sale and delivery of property, the Government, by drafting one of the parties into the army, or by requisitioning the subject matter, does not thereby take the contract.
>
> * * * * *
>
> The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, *the capacity output of factories and other producing activities.* If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future *service* or *delivery,* the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things. (Italics ours.)

The decision in *A. W. Duckett & Company* v. *United States,* 266 U. S. 149, is distinguishable. In commenting on the *Omnia case,* the Court said in the *Duckett case* (p. 152):

> The contract was no part of the *res* taken and whatever might be the collateral consequences of the appropriation liability for them was not an incident of the Government's act. * * * Here the claimant's possession under its lease was a part of the *res,* and therefore was within the implied promise to pay.

The distinction is stated and discussed in the opinion of the court below (R. 71–72) in the following language:

> By reason of the alleged taking, the contract to furnish so much water to the plaintiff was frustrated, not taken. The situation, as far as the principle involved is concerned, is the same as in the *Omnia Commercial Co. case,* 261 U. S. 502, 511. The damage to the plaintiff was incidental. The Government did not take plaintiff's plant or its contract with the Niagara Falls Power Company, nor did it intend to take it.
>
> In this case the Government, if it took anything, did not take the res, as it was held in the *Duckett case,* 266 U. S. 149, that it did. There it took over the whole terminal plant, and the plantiff was the lessee of a portion of it, and it was held that the taking over of the res took his lease, which was a part of the res, but in the case at bar the Government did not take the res, it did not take over the plant or its operation or its use. It simply commandeered the output or product of the plant, that is, such power as the plant under the conduct and management of the company was able to turn out, and this is as close to what was done in the *Omnia Commercial case, supra,* as we could well have it without having the identical facts. In that case plantiff had a contract antedating the taking, under which the company was to furnish it so many tons of steel at a given price for which it had already

paid. The court held that the contract was not taken, but frustrated, and that it was an incidental loss for which there was no recovery, a loss incident to the legitimate exercise of a sovereign right by the Government.

But, further, by the subsequent contract with the Niagara Falls Power Company by which the plaintiff was deprived of its rights, the Government did not even appropriate or receive the product, as in eminent domain, of the Niagara Falls Power Company for public use, but, on the contrary, it was furnished to and received by those corporations named in said schedule, with the consent of said company. It controlled the distribution of the product under a contract with that company, in which contract that company expressly waived all claims for damage, if any there were, by reason of the previous requisition to which this contract was the successor. The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned.

III

IF THE PETITIONER HAS ANY RIGHT OF INDEMNITY, IT IS AGAINST THE POWER COMPANY

The Power Company is responsible in damages for failure to supply the stipulated quantity of

water to the petitioner unless excused by impossibility of performance.

The Power Company during the period in question sold the electric power, which it generated by using the water diverted from the petitioner, to essential industries approved by the War Department. It received compensation therefor presumably adequate. The demand for power in the vicinity exceeded the available supply. The standard price for electric energy increased from the rate of $20 per horsepower per annum on November 1, 1917, to a rate varying between $33 and $47.05 per horsepower per annum between February 7, 1918, and November 30, 1918. (Finding XXIII; R. 65.) Of the total water power utilized by the Power Company during this period the proportion to which petitioner would have been entitled was 7.2 per cent, for which it would have been obligated to pay at the rate of $75,562.50 per annum. (R. 54.)

The Government received no pecuniary benefit from the transaction. To permit the petitioner to recover a judgment against the United States, and thus in effect to exempt the Power Company from liability for the diversion of the water, would result in the unjust enrichment of the Power Company.

CONCLUSION

The case turns on its own peculiar facts and, we submit, was correctly decided below. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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